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No. _____
COA No. 57651-8-I CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In The Matter of the Personal Restraint of

MONTGOMERY MANRO,

Petitioner.

MOTION FOR DISCRETIONARY REVIEW

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ORIGINAL

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A. IDENTITY OF PETITIONER

Montgomery A. Manro asks this Court to accept review of the decision designated in Part B of this motion.

B. DECISION

Petitioner seeks review of the unpublished decision of the Court of Appeals in *In the Matter of the Personal Restraint of Montgomery A. Manro*, No. 57651-8-I, issued on April 21, 2008. A copy of the decision is attached in Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Is a Personal Restraint Petition moot simply because the petitioner served his sentence?
2. Does the decision of the Court of Appeals conflict with decisions of this Court?
3. Is Due Process of Law under U.S. Const. amend. 14 violated by the convictions in this case?

D. STATEMENT OF THE CASE

The Court of Appeals recitation of the facts in this case is as follows:

On April 5, 2002, following an attack on two other high school students, the State charged Manro and three

juvenile co-defendants with first degree assault. Manro was also charged with a separate count of fourth degree assault.

Because Manro was 17, the first degree assault charge resulted in an automatic decline of juvenile jurisdiction and transfer to adult court for trial under former RCW 13.04.030. Anticipating that he might be acquitted of the auto-decline offense, Manro repeatedly attempted, both before and during trial, to persuade the superior court to extend juvenile court jurisdiction. The trial court denied all of Manro's requests. Manro turned 18 after trial began but before the jury returned its verdict.

On December 16, 2002, the jury found Manro's co-defendants guilty as charged. The jury found Manro not guilty of first degree assault but guilty of the lesser included offense of fourth degree assault. The jury also found Manro guilty of the separate count of fourth degree assault. Prior to sentencing, Manro moved for entry of a nunc pro tunc order extending juvenile jurisdiction and for an arrest of judgment or new trial. The trial court denied the motion and on February 14, 2003, imposed consecutive suspended sentences with a total incarceration of seven months and 240 hours of community service. The court then stayed Manro's sentences pending appeal.

On appeal, Manro argued that the trial court erred by not extending juvenile jurisdiction and transferring the remaining charges back to juvenile court for disposition after the jury acquitted him of first degree assault, the sole charge requiring automatic declination. This court disagreed, concluding that under former RCW 13.04.030, the nature of the charge--and not the resulting conviction--determined adult court jurisdiction. [Footnote omitted] Consequently, we reasoned, once a juvenile has been charged with auto-decline offenses and the case properly transferred to adult court, the subsequent acquittal of all auto-decline offenses does not defeat adult court

jurisdiction. [Footnote omitted] The Supreme Court denied further review. [Footnote omitted]

Acting in response to this court's decision in Manro's appeal, the legislature amended former RCW 13.04.030 to expressly require that a juvenile be returned to juvenile court for disposition of any remaining charges if he or she is acquitted of all offenses that required an automatic decline. [Footnote omitted] As amended, RCW 13.04.030 now provides:

The juvenile court shall have exclusive jurisdiction over the disposition of any remaining charges in any case in which the juvenile is found not guilty in the adult criminal court of the charge or charges for which he or she was transferred, or is convicted in the adult criminal court of a lesser included offense that is not also an offense listed in (e)(v) of this subsection. The juvenile court shall enter an order extending juvenile court jurisdiction if the juvenile has turned eighteen years of age during the adult criminal court proceedings pursuant to RCW 13.40.300. However, once the case is returned to juvenile court, the court may hold a decline hearing pursuant to RCW 13.40.110 to determine whether to retain the case in juvenile court for the purpose of disposition or return the case to adult criminal court for sentencing.

[Footnote omitted] The amendment became effective July 24, 2005, before the mandate issued in Manro's appeal.

On December 27, 2005, shortly before he was to begin serving his adult sentence, Manro petitioned for a

writ of habeas corpus in superior court. Among other things, he contended that the recent amendment clarifying RCW 13.04.030 was remedial and should apply retroactively. Manro argued that the superior court therefore lacked authority to sentence him as an adult.

The superior court transferred the matter for consideration as a personal restraint petition. [Footnote omitted] On February 17, 2006, we stayed Manro's petition pending a final decision in *State v. Posey*. [Footnote omitted] After the Supreme Court filed its decision in *Posey* on September 20, 2007, [footnote omitted] we lifted the stay on Manro's petition and requested additional briefing from the parties. Manro has now fully completed his sentence.

Slip Op. at 1-4.

Ultimately, what this recitation reveals is that through no fault of his own, Mr. Manro has been stigmatized with two adult convictions for fourth degree assault, when at most Mr. Manro should have two juvenile court convictions. This is a case where the State overcharged Mr. Manro, charging him with assault in the first degree in adult court rather than charging him with the appropriate charges (misdemeanor assault) in juvenile court. This is a case where the Court of Appeals misread the pertinent statutes and affirmed Mr. Manro's convictions in 2005, *State v. Manro*, 125 Wn. App. 165, 104 P.3d 708 (2005), which required prompt legislative action to amend the statutes involved in direct response to the

Court of Appeals' decision. Laws of 2005, ch. 238, § 1. This is a case where, after the Legislature changed the law, Mr. Manro filed a writ of habeas corpus in superior court so that the legislative change could be applied to his case and he would not have to serve jail time, but the superior court transferred the case to the Court of Appeals for treatment as a Personal Restraint Petition, and the case then languished for two years while this Court decided a related case, *State v. Posey*, 161 Wn.2d 638, 167 P.3d 560 (2007). Finally, after it was clear that Mr. Manro was correct, and that the trial court and the Court of Appeals were wrong, the Court of Appeals then dismissed Mr. Manro's PRP on mootness grounds. This decision too was error.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

RAP 13.5A(b) states that this Court will apply the considerations in RAP 13.4(b) to determine whether to grant a motion for discretionary review of a PRP. Review here is appropriate under RAP 13.4(b)(1) – a conflict with past decisions of this Court, particularly cases which have held that the PRP remedy does not contain a “custody” requirement like the federal remedy under 28 U.S.C. § 2254. Review should also be granted under RAP 13.4(b)(3) because of the federal constitutional issues

involved.

Here, it is apparent from the Court of Appeals' decision and from this Court's decision in *Posey* that Mr. Manro was improperly sentenced as an adult – that in the absence of a decline hearing, Mr. Manro should not be stigmatized with two adult fourth degree assault convictions. This is the argument that Mr. Manro has been trying to make for six years.

The Court of Appeals essentially recognized this argument, but threw up its hands and concluded that because Mr. Manro served his time (even though he filed a writ to try to prevent that from happening) the matter was moot and no relief could be granted:

But because Manro is now 23, the juvenile court no longer has any authority to act in this case. [Footnote omitted]
Moreover, Manro has now fully completed his adult sentence, and he has not demonstrated any restraint or disability remaining from his conviction. Because this court can no longer provide any meaningful relief, Manro's petition is moot.

Slip Op. at 6.

Yet, the fact that Mr. Manro has served his sentence does not make this case moot. To be sure, a federal writ of habeas corpus is restricted to someone who “is in custody in violation of the Constitution or laws or

treaties of the United States." 28 U.S.C. § 2241(c)(3).¹ This language must be contrasted with RAP 16.4 which includes within the definition of "restraint" someone who "is confined," someone who "is subject to imminent confinement" or someone who "is under some other disability resulting from a judgment or sentence in a criminal case." RAP 16.4(b). Thus, RAP 16.4 affords relief not only to those who are confined and are about to be confined – "in custody" under the federal writ statute – but also to those who are under a "disability" as a result of a criminal conviction.

In *In re Powell*, 92 Wn.2d 882, 602 P.2d 711 (1979), this Court construed this language to afford a remedy to a woman whose probation was revoked, but who was serving her time concurrently with another valid prison commitment:

It is our opinion that release from confinement is no longer the sole function of the writ of habeas corpus. [citations omitted] We note that an unlawful conviction can serve as a restraint on liberty due to collateral consequences affecting one adjudged to be a habitual criminal. [citations omitted] An unlawful conviction also serves as a restraint on liberty due to its effect on the parole process and

¹ It should be noted that under the federal system, if someone is not "in custody" he or she can still challenge a conviction by filing a writ of coram nobis. See *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005) *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). The PRP remedy should be seen as an inclusive remedy, which encompasses both habeas corpus and coram nobis relief.

potential effect on future minimum sentences and actual time served. It further creates difficulties for a former prisoner attempting to reestablish himself or herself with society upon release from prison. Habeas corpus relief can "serve to relieve the stigma and burden of an invalid sentence regardless of its position in relation to other sentences." [citation omitted] This view of habeas corpus seems consistent with RAP 16.4(b) . . . Therefore, we deem it appropriate to consider petitioner's claim that her restraint arising from the drug conviction is unlawful even though she must serve a lawful concurrent sentence.

92 Wn.2d at 887-88. Disabilities can also include the denial of employment opportunities, denial of public housing benefits, and immigration consequences (i.e. Mr. Manro may not be able to enter another country because of the adult convictions in this case). *See also Born v. Thompson*, 154 Wn.2d 759, 762-66, 117 P.3d 1098 (2005) (future collateral consequences of judicial finding that defendant committed violent act constitutes "restraint"); *In re Davis*, 142 Wn.2d 165, 170 n.2, 12 P.3d 603 (2000) (defendant still under restraint and could file PRP even if no longer incarcerated or under state supervision).

Thus, the Court of Appeals decision directly conflicts with this Court's decisions in *Powell*, *Born* and *Davis*. The fact that Mr. Manro served his time unjustly in an adult jail does not moot out his case. Under this Court's clear precedent, Mr. Manro is "under restraint" because of the

continuing stigma of adult convictions. One supposes that if the State disputes that there is any continuing stigma that Mr. Manro has as a result of the convictions, the State should immediately agree to expunge the convictions and seal the files.

In this regard, this Court's decision in *In re Dalluge*, 152 Wn.2d 772, 100 P.3d 279 (2004), supports Mr. Manro. In *Dalluge*, the petitioner had been charged with an auto-decline offense, but the prosecutor later amended the information to charge a non-auto-decline offense. This Court held that this retroactively invalidated the decline and required a transfer back to juvenile court for a decline hearing. Even though the petitioner was well beyond age 18, he was not without a remedy:

We conclude that where the defendant has since turned 18, the appropriate remedy for a trial court's failure to remand to juvenile court is remand to the adult criminal court for a de novo hearing on whether declination would have been appropriate. If declination would have been appropriate, then the conviction stands, but if not, the defendant is entitled to a new trial.

152 Wn.2d at 786-787.

Division One distinguished *Dalluge* on the ground that the error there, as in *Posey*, was the failure of the adult court to transfer the remaining charges to juvenile court, whereas in Manro's case:

In juvenile court, Manro would have been entitled only to a determination of whether he should have been sentenced in juvenile court or in adult court, not a new trial. [Footnote omitted] The same result follows from the express language of the 2005 statutory amendment. [Footnote omitted] *Dalluge* provides no support for additional proceedings here, and Manro has not identified any other basis for relief.

Slip Op. at 7-8.

Yet, a remand to juvenile court to see whether Mr. Manro should have been sentenced in juvenile or adult court would still be of value. If the juvenile court concluded that Mr. Manro should not have been sentenced in adult court, the remedy would be to vacate the adult convictions and juvenile dispositions could be entered. While the court may be powerless to sentence Mr. Manro to any juvenile punishment, the court could still vacate the adult judgment and sentence, and impose a juvenile disposition order, giving Mr. Manro credit for the time he unfairly served in an adult jail, and close the case.

Accordingly, the Court of Appeals' decision conflicts with multiple decisions of this Court, and review should be granted under RAP 13.4(b)(1).

Additionally, the imposition of a judgment for an adult felony conviction, where there was no jurisdiction for such a conviction, violates

due process of law under U.S. Const. amend. 14. *Fiore v. White*, 531 U.S. 225 (2001) (*per curiam*). Review should also be granted under RAP 13.4(b)(3).

F. CONCLUSION

For the foregoing reasons, this Court should accept review and vacate the adult convictions.

DATED this 24 day of May 2008.

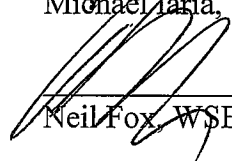
Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of

MONTGOMERY A. MANRO,

Petitioner.

)
) No. 57651-8-I
)
) DIVISION ONE
)
) UNPUBLISHED OPINION
)
) FILED: April 21, 2008
)

PER CURIAM — The State charged Montgomery Manro, a juvenile, with a crime that required automatic transfer to adult court for trial. When the jury acquitted Manro of that offense, the trial court erred by failing to remand the remaining charges to juvenile court for disposition. Manro has filed a personal restraint petition challenging the error. But because Manro has fully served his adult sentence, this court cannot provide meaningful relief by means of a personal restraint petition. Accordingly, we deny the petition as moot.

FACTS

On April 5, 2002, following an attack on two other high school students, the State charged Manro and three juvenile co-defendants with first degree assault. Manro was also charged with a separate count of fourth degree assault.

Because Manro was 17, the first degree assault charge resulted in an automatic decline of juvenile jurisdiction and transfer to adult court for trial under former RCW 13.04.030. Anticipating that he might be acquitted of the auto-decline offense, Manro repeatedly attempted, both before and during trial, to persuade the superior court to

extend juvenile court jurisdiction. The trial court denied all of Manro's requests. Manro turned 18 after trial began but before the jury returned its verdict.

On December 16, 2002, the jury found Manro's co-defendants guilty as charged. The jury found Manro not guilty of first degree assault but guilty of the lesser included offense of fourth degree assault. The jury also found Manro guilty of the separate count of fourth degree assault. Prior to sentencing, Manro moved for entry of a nunc pro tunc order extending juvenile jurisdiction and for an arrest of judgment or new trial. The trial court denied the motion and on February 14, 2003, imposed consecutive suspended sentences with a total incarceration of seven months and 240 hours of community service. The court then stayed Manro's sentences pending appeal.

On appeal, Manro argued that the trial court erred by not extending juvenile jurisdiction and transferring the remaining charges back to juvenile court for disposition after the jury acquitted him of first degree assault, the sole charge requiring automatic declination. This court disagreed, concluding that under former RCW 13.04.030, the nature of the charge—and not the resulting conviction—determined adult court jurisdiction.¹ Consequently, we reasoned, once a juvenile has been charged with auto-decline offenses and the case properly transferred to adult court, the subsequent acquittal of all auto-decline offenses does not defeat adult court jurisdiction.² The Supreme Court denied further review.³

Acting in response to this court's decision in Manro's appeal, the legislature amended former RCW 13.04.030 to expressly require that a juvenile be returned to

¹ State v. Manro, 125 Wn. App. 165, 173-74, 104 P.3d 708 (2005).

² Manro, 125 Wn. App. at 174-75.

³ State v. Manro, 155 Wn.2d 1010, 122 P.3d 912 (2005).

juvenile court for disposition of any remaining charges if he or she is acquitted of all offenses that required an automatic decline.⁴ As amended, RCW 13.04.030 now provides:

The juvenile court shall have exclusive jurisdiction over the disposition of any remaining charges in any case in which the juvenile is found not guilty in the adult criminal court of the charge or charges for which he or she was transferred, or is convicted in the adult criminal court of a lesser included offense that is not also an offense listed in (e)(v) of this subsection. The juvenile court shall enter an order extending juvenile court jurisdiction if the juvenile has turned eighteen years of age during the adult criminal court proceedings pursuant to RCW 13.40.300. However, once the case is returned to juvenile court, the court may hold a decline hearing pursuant to RCW 13.40.110 to determine whether to retain the case in juvenile court for the purpose of disposition or return the case to adult criminal court for sentencing.^[5]

The amendment became effective July 24, 2005, before the mandate issued in Manro's appeal.

On December 27, 2005, shortly before he was to begin serving his adult sentence, Manro petitioned for a writ of habeas corpus in superior court. Among other things, he contended that the recent amendment clarifying RCW 13.04.030 was remedial and should apply retroactively. Manro argued that the superior court therefore lacked authority to sentence him as an adult.

The superior court transferred the matter for consideration as a personal restraint petition.⁶ On February 17, 2006, we stayed Manro's petition pending a final decision in State v. Posey.⁷ After the Supreme Court filed its decision in Posey on

⁴ See Laws of 2005, ch. 238, § 1; State v. Posey, 130 Wn. App. 262, 274-275, 122 P.3d 914 (2005), rev'd in part on other grounds, 161 Wn.2d 638, 647, 167 P.3d 560 (2007).

⁵ RCW 13.04.030(1)(e)(v)(E)(II).

⁶ See Toliver v. Olsen, 109 Wn.2d 607, 746 P.2d 809 (1987).

⁷ State v. Posey, 130 Wn. App. 262, 275, 122 P.3d 914 (2005), rev. granted, pet. for

September 20, 2007,⁸ we lifted the stay on Manro's petition and requested additional briefing from the parties. Manro has now fully completed his sentence.

DECISION

In order to be entitled to relief by means of a personal restraint petition, Manro must demonstrate either an error of constitutional magnitude that gives rise to actual prejudice or a nonconstitutional error that inherently results in a "complete miscarriage of justice."⁹ Manro must also establish that he is currently under some unlawful "restraint," which includes any "disability resulting from a judgment or sentence in a criminal case."¹⁰ The State contends that, because Manro is now 23 and has fully completed his adult sentence, this court cannot provide any meaningful relief. Because the error in this case involved the adult court's failure to transfer Manro's fourth degree assault convictions to juvenile court for disposition, we agree.

In State v. Posey, the 16-year-old defendant was charged in 2002 with one count of first degree assault and three counts of second degree rape. Because the first degree assault required automatic declination, the juvenile court transferred the case to adult court. Following trial, the jury acquitted Posey of first degree assault and found him guilty on two counts of second degree rape. The court then sentenced Posey as an adult to a minimum term of 119 months.

On appeal, Division Three of the Court of Appeals affirmed Posey's conviction and rejected his contention that the adult court lacked authority to sentence him once

review granted October 12, 2006.

⁸ State v. Posey, 161 Wn.2d 638, 167 P.3d 560 (2007).

⁹ In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

¹⁰ RAP 16.4(b); see also In re Pers. Restraint of Meyer, 142 Wn.2d 608, 615, 16 P.3d 563 (2001).

the jury acquitted him of the sole auto-decline offense. The court further acknowledged that under the 2005 amendment to RCW 13.04.030, Posey would have been returned to the juvenile court for disposition, but concluded the amendment could not be applied retroactively because it would contravene the judicial interpretation in State v. Manro.¹¹

Upon further review, our Supreme Court reversed in part, holding that Posey was incorrectly sentenced as an adult.¹² Reviewing the statutory framework in effect in 2002 when Posey committed his offenses, the court concluded that under the automatic decline provision in former RCW 13.04.030(1)(e)(v)(A), the nature of the conviction—rather than the charge—determined the adult court's authority to act, effectively overruling this court's analysis in Manro's appeal.¹³ The court further noted its previous recognition that the statute "furthers the legislative intent to punish with certainty and more severity those juvenile offenders who commit violent crimes rather than those youthful offenders who commit other crimes."¹⁴

Consequently, when Posey was acquitted of the sole auto-decline offense, the adult court lacked "sentencing jurisdiction" and should have transferred the remaining charges back to juvenile court for disposition.¹⁵ The court considered the 2005 amendment to be additional evidence of the legislature's intent to maintain the distinction between the juvenile justice and criminal adult systems. Because the 2005 changes were consistent with its statutory analysis, the court did not have to reach

¹¹ State v. Posey, 130 Wn. App. at 273-75.

¹² State v. Posey, 161 Wn.2d 638, 167 P.3d 560 (2007).

¹³ Posey, 161 Wn.2d at 643-44.

¹⁴ Posey, 161 Wn.2d at 644 (citing State v. Mora, 138 Wn.2d 43, 50, 977 P.2d 564 (1999)).

¹⁵ Posey, 161 Wn.2d at 647.

Posey's contention that they should be applied retroactively.¹⁶ The court then affirmed Posey's conviction and remanded the matter to juvenile court for further proceedings.¹⁷

Posey construed the same statutes in effect at the time Manro committed his offenses. As Manro repeatedly argued below and the State now concedes, the jury's acquittal on the first degree assault charge, the sole auto-decline offense, automatically restored juvenile court jurisdiction over the remaining fourth degree assault charges, and the matter should have been transferred to juvenile court, as in Posey, for disposition.¹⁸ But because Manro is now 23, the juvenile court no longer has any authority to act in this case.¹⁹ Moreover, Manro has now fully completed his adult sentence, and he has not demonstrated any restraint or disability remaining from his conviction. Because this court can no longer provide any meaningful relief, Manro's petition is moot.²⁰

Relying solely on In re Personal Restraint of Dalluge,²¹ Manro contends that he may be entitled to a new trial. In Dalluge, the State originally charged Dalluge, a juvenile, with an auto-decline offense. Before trial, the State amended the information to charge two lesser offenses, neither of which required automatic transfer to adult court. Nonetheless, the State tried Dalluge as an adult without holding a declination hearing. In granting Dalluge's petition, the Supreme Court concluded that once the

¹⁶ Posey, 161 Wn.2d at 645-46.

¹⁷ Posey, 161 Wn.2d at 649.

¹⁸ See Posey, 161 Wn.2d at 641.

¹⁹ See RCW 13.40.300(3) (juvenile court generally has no authority to extend jurisdiction beyond juvenile offender's twenty-first birthday).

²⁰ See In re Det. of Cross, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983) (a claim is moot if the court can provide no effective relief).

²¹ 152 Wn.2d 772, 100 P.3d 279 (2004).

charges were amended, the adult court lacked authority to render a judgment and should have remanded the matter to juvenile court for a decline hearing.²² Under the circumstances, the court determined that Dalluge was entitled to a hearing in accordance with Dillenburg v. Maxwell²³ to determine whether the juvenile court would have retained jurisdiction:

We conclude that where the defendant has since turned 18, the appropriate remedy for a trial court's failure to remand to juvenile court is remand to the adult criminal court for a de novo hearing on whether declination would have been appropriate. If declination would have been appropriate, then the conviction stands, but if not, the defendant is entitled to a new trial.^[24]

Manro maintains that he is entitled to an identical remedy. But the error in Dalluge and the need for a Dillenburg hearing arose from the adult court's lack of authority to determine Dalluge's guilt without a decline hearing.²⁵ Here, the case was properly transferred to adult court for trial, and there is no challenge to the trial court's determination of Manro's guilt. Rather, the resulting error, as in Posey, was the adult court's failure to transfer the remaining charges to juvenile court. In juvenile court, Manro would have been entitled only to a determination of whether he should have been sentenced in juvenile court or in adult court, not a new trial.²⁶ The same result follows from the express language of the 2005 statutory amendment.²⁷ Dalluge

²² Dalluge, 152 Wn.2d at 785.

²³ 70 Wn.2d 331, 413 P.2d 940, 422 P.2d 783 (1966).

²⁴ Dalluge, 152 Wn.2d at 786-87.

²⁵ See Dalluge, 152 Wn.2d at 785.

²⁶ See Posey, 161 Wn.2d at 647.

²⁷ See RCW 13.04.030(1)(e)(v)(E)(II) ("once the case is returned to juvenile court, the court may hold a decline hearing pursuant to RCW 13.40.110 to determine whether to retain the case in juvenile court for the purpose of disposition or return the case to adult criminal court for sentencing").

provides no support for additional proceedings here, and Manro has not identified any other basis for relief.²⁸

Because Manro has already completed his adult sentence, we can provide no further relief for the trial court's error. A remand for further proceedings would serve no useful purpose. Accordingly, we deny Manro's petition as moot.²⁹

FOR THE COURT:

/s/ Leach, J.

/s/ Dwyer, A.C.J.

/s/ Cox, J.

²⁸ Similarly, State v. Meridieth, No. 35345-8 (Ct. App. April 15, 2008), is inapposite because the court addressed the remedy for an improper automatic declination of juvenile jurisdiction before trial.

²⁹ Manro has not identified any issues of continuing and substantial public interest that warrant further consideration. See In re Pers. Restraint of Mines, 146 Wn.2d 279, 285, 45 P.3d 535 (2002).